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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1960.

No. [redacted] 136

WALLACE DELANEY MOHAMMED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari to the United States Court Of Appeals For The Seventh Circuit

WILLIAM R. MING, JR.,
GEORGE N. LEIGHTON,
ELLIS E. REID,
123 West Madison Street,
Chicago 2, Illinois,
Counsel for Petitioner.

Midwest Law Printing Co., - 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

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Wallace Delaney Mohammed, petitioner, prays that a Writ of Certiorari issue to review in this case the judgment of the United States Court of Appeals for the Seventh Circuit.

CITATIONS TO OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 288 F. 2d 236 (1961) and is printed in Appendix A hereto, *infra*, p. 1a.

JURISDICTION.

Judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 21, 1961. A petition for rehearing was denied on May 1, 1961. The jurisdiction of this court is invoked under 28 U.S.C, §1254 (1).

QUESTIONS PRESENTED.

1. (a) Whether petitioner was denied due process of law by the failure of the local board to consider and grant petitioner's request for reclassification and exemption from the requirements of the Universal Military Training and Service Act as a minister of religion.

(b) Whether the Court of Appeals by its opinion rendered herein departed from the "basis in fact" doctrine heretofore announced by this Honorable Court in similar cases.

2. Whether the action of the Selective Service System with regard to petitioner was an interference with religious freedom in violation of the First Amendment to the Constitution of the United States.

3. Whether petitioner was denied due process of law by being placed in a position wherein the same sovereign commanded petitioner to do two mutually inconsistent acts in that indictment 59 CR 64 is based on an order to report issued at a time when petitioner was, although on bail, still within the custody of the District Court awaiting trial on indictment 57 CR 532 which charged a similar offense, and whether under the circumstances petitioner could form the requisite criminal intent.

4. Whether the petitioner was denied due process of law upon the trial of this cause by the admission into evidence over petitioner's objection of an unsigned resumé of investigation, which contained hearsay as to defendant's father upon which the trial court placed some reliance.

5. Whether petitioner was denied due process of law because an officer of the military establishment dominated the whole course of an administrative proceeding before the local board.

6. Whether petitioner was denied due process of law by the exclusion of evidence tendered by petitioner as to his ministerial status despite the evidence of government witnesses themselves that petitioner's claim to ministerial exemption had never been considered by the local board and despite the fact that portions of the excluded evidence had been tendered to the local board and refused by it.

7. Whether the trial court erred to the prejudice of petitioner by allowing the government's motion to consolidate 57 CR 532 and 59 CR 64 for trial over the objection of petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The constitutional provisions involved are the First and Fifth Amendments to the Constitution of the United States. The statutory provisions involved are 50 U.S.C., App., §§456 (g), (j), 460 (b), and 466 (g); and 28 U.S.C., §1733. The administrative regulations involved are 32 C.F.R. §§1625.1, 1625.2 1625.4, 1625.11, 1625.12, 1625.13, 1625.14. These are printed in Appendix B, *infra*, pp. 16a-24a.

STATEMENT.

Federal jurisdiction was conferred upon the United States District Court for the Northern District of Illinois, Eastern Division by the Universal Military Training and Service Act. 50 U.S.C., App., §451 et seq. Said court entered judgment after a trial without a jury finding petitioner guilty of a violation of said Act and the Court of Appeals for the Seventh Circuit affirmed said judgment.

This is a case of a defendant, now a minister, who when he was nineteen years of age registered under the Universal Military Training and Service Act with Local Board 48, Chicago, Illinois, on November 29, 1952 (GX A and B; A. 61). (*) On December 18, 1952, he claimed to be a conscientious objector because of his religious beliefs (GX B3; A. 94). That claim was denied by the local board, but after an administrative appeal and on recommendation of the Department of Justice, Local Board 48 finally classified defendant as 1-O over three and one half years later on June 6, 1956 (GX B30 and GX B31; A. 63-64). Even prior thereto beginning February 21, 1956 the board wrote defendant a series of letters urging him to choose institutions where he would perform non-military service (GX B25, B35, B36, B37, B42, B43; A. 63, 66-70). One such letter was dated October 1, 1956.

In reply thereto by a letter dated October 9, 1956, defendant refused so to do and advised the local board of

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(*) Government's exhibits are referred to herein as GX followed by identification letter or number and the Appendix reference. Defendant's exhibits are referred to as DX. Appendix references are referred to herein as A.

his full time work for the Temple of Islam No. 2, 5335 South Greenwood Avenue, Chicago, Illinois, a Muslim religious group (DX 1; A. 93). The local board never considered or replied to the letter and took no action with respect to it (A. 37 and 46).

Instead on January 15, 1957, defendant was required to appear before the local board for the sole purpose of requiring him to select the type of civilian work he wished to do in lieu of induction (A. 37). Defendant tried to inform the board members of his religious status, but was told that the matter was not before the board (A. 28 and 46). Practically all of the talking at the meeting was done by Lt. Col. Woodworth, an Air Force officer assigned as Deputy Director of Selective Service for Illinois (A. 36-37). At that meeting defendant made a written statement on a copy of SSS Form No. 152 stating that he did not understand the form because he did not know the work would take all of his time (GX B28; A. 95), though he denied completing the remainder of the form, and it is not signed by him. (A. 49). Defendant made several oral claims at the meeting which were reduced to writing regarding his ministerial status (GX B46, A. 74, 75). Defendant's brother and brother-in-law, the latter one of the trustees of the Temple of Islam, went with the defendant to the local board on January 15, 1957 at his request, but when they sought admittance to the meeting they were excluded at the direction of the local board (A. 32, 43 and 46).

On February 11, 1957, an order which was later determined to be invalid was issued directing defendant to report on March 4, 1957 to the local board to be ordered to report to Elgin State Hospital for work (GX B50; A. 79). Defendant reported to the board the next day but did not go to the hospital. (GX B51; A. 80). The August, 1957

Grand Jury returned an indictment, No. 57 CR 532, charging defendant with violation of the Universal Military Training and Service Act (A. 7-8).

Prior to trial on that indictment, on April 1, 1958, defendant, by a letter addressed to the Illinois State Director of Selective Service with a copy directed to Local Board 48, explicitly asked reconsideration of his classification because his claim to status as a ministerial student and assistant minister had not been acted upon (GX B63; A. 81). On April 10, 1958, that request of defendant was denied in a letter over the signature of Lt. Col. F. B. Woodworth, Deputy State Director (GX D2; A. 89-90). In that letter it is asserted that defendant's ministerial status was considered at the local board meeting of January 15, 1957. However, Lt. Col. Woodworth, in testifying here, admitted that this was not true (A. 37). Col. Woodworth's letter also stated that

> "(i)n order to qualify for classification as a divinity student under Section 1622.43 (a) (3) of the Selective Service Regulations, a registrant must be a student preparing for the ministry under the directions of a *recognized* church or religious organization and must be satisfactorily pursuing a full-time course of instruction in a *recognized* Theological or divinity school." (Emphasis supplied)

Col. Woodworth testified here that "recognized" ordinarily meant *recognized by the local board*. But he admitted that Local Board 48 made no such a determination in this case (A. 37).

In a trial concluded May 20, 1958, before a jury, defendant was found guilty, but on his motion a new trial was ordered on the ground that the local board order was void in that there was no evidence that it was issued by the local board (DX 16; A. 56). Without further consideration

and on the request of the United States Attorney (DX 16; A. 56), the local board on October 21, 1958, while petitioner was awaiting a new trial on 57 CR 532, issued an order directing the defendant to report to it on November 3, 1958, to be ordered to report to work at Elgin State Hospital (GX B66; A. 82). On October 31, 1958, by a letter to Local Board 48, the defendant again requested reclassification and a hearing before the local board in order to present additional proof of his ministerial status (GX B67; A. 84). This request was answered on November 10, 1958 (GX B73; A. 86), by a letter that stated in part:

> "Please be advised the Local Board considered this matter closed as such evidence of ministerial duties have (sic) been considered by them; therefore no further action will be taken in this case."

Helen Everling testified for the government that the local board reconsidered petitioner's classification on October 21, 1958 (A. 34). The "Minutes of Actions by Local Board and Appeal Board" (GX B3; A. 94), show no such determination, however.

By a letter dated November 24, 1958 (DX 20; A. 60), in response to a telegram by defendant dated November 21, 1958, the State Director, by V. M. Nichels, advised defendant that because his case was in the hands of the United States Attorney it was impossible for the appeal board to take any action in connection with his case.

Similarly, by a letter dated November 25, 1958, the local board, by C. S. Stillwell, Chairman, advised the defendant that his request by telegram of November 21, 1958, for a personal appearance before the local board to consider his status as a minister of religion was denied (DX 10; A. 59).

The defendant did not report to the local board on November 3, 1958 (A. 32).

Indictment 59 CR 64, charging a wilful failure and refusal to report to Elgin State Hospital, was filed on January 29, 1959. Defendant moved to dismiss that indictment on the ground, inter alia, that it was impossible to report as ordered and not violate his bond under 57 CR 532, and on denial of his motion (A. 8), entered a plea of not guilty. On motion of the Government and over the objection of defendant, this cause was consolidated with cause No. 57 CR 532 for trial (A. 9). At the close of the Government's case in chief as to both indictments, on the motion of the defendant a judgment of acquittal was entered as to 57 CR 532 on the ground that the order of the local board involved there was not lawfully entered (A. 9).

When petitioner sought to adduce evidence as to his ministerial status which his two witnesses who were excluded from the local board meeting of January 15, 1957 were then prepared to present, the district court sustained an objection by the Government (A. 39, 40, 42, 43, 44 and 47). Similarly, except as to testimony by the defendant himself, the district court sustained the objections of the Government to evidence as to the ministerial status of the defendant at all of the times material herein.

At the close of all evidence the defendant moved for a judgment of acquittal. The district court denied that motion with a memorandum (A. 9). Thereafter the defendant was found guilty and sentenced to three years imprisonment.

An appeal was taken to the Court of Appeals for the Seventh Circuit and the judgment of the district court was affirmed.

REASONS FOR GRANTING THE WRIT.

1. (a) The law should not require that we convict a man who, in reality, is exempt from the terms of the statute under which he stands convicted, and who has timely raised the issue of his exemption, but who has been given no administrative or judicial forum within which to prove his claim. 50 U.S.C., App., §§456 (g), (j), and 466 (g).

The regulations promulgated pursuant to the statute in question state that no classification is permanent. 32 C.F.R. §1625.1. The facts herein present a reclassification problem wherein a registrant, after being classified, later realized he was entitled to another classification due to changed circumstances and then requested a reclassification. 32 C.F.R. §1625.2 provides in part that the local board *may* reopen and consider anew the classification of a registrant if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification. Petitioner wrote three letters to the attention of the local board (DX 1, A. 93; GX B63, A. 81; GX B67, A. 84) which, reasonably construed, claimed that petitioner was a minister of religion, a fact which, if true, would require reclassification. Petitioner also made several oral claims, which were reduced to writing (GX B46; A. 74, 75) by the local board, that he had been under religious training all of his life and that all his time was devoted to the study and teaching of the religion of Islam when not working.

In *Dickinson* v. *United States*, 346 U.S. 389, 74 S. Ct. 152 (1953), it appears that this Honorable Court contem-

plated that there would be some sort of administrative hearing on the issue, here, admittedly there was none.

The court said at 346 U.S. 389, 396:

> "The local board may question a registrant under oath, subpoena witnesses to testify, and require both registrant and witnesses to produce documents. 32 C.F.R. §1621.15. The board is authorized to obtain information from local, state and national welfare and governmental agencies. 32 C.F.R. §1621.14. The registrant's admissions, testimony of other witnesses frequently unsolicited evidence from a registrant's neighbors, or information obtained from other agencies may produce dissidence which the boards are free to resolve. Absent such admissions or other evidence, the local boards may call on the investigative agencies of the federal government, as they would if a registrant were suspected of perjury. But when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice".

Here, the record shows that the local board took no action on the claim for reclassification. Indeed, in its zeal to totally ignore petitioner's claim the local board excluded from the local board meeting of January 15, 1957 two witnesses who had accompanied petitioner there for the express purpose of testifying to petitioner's ministerial activities. The local board took the position that the meeting was not called for that purpose and therefore they were justified in refusing to listen to the petitioner's tendered proof.

The administrative regulations, as they now exist, put a premium on requesting a ministerial exemption from the outset and offer no procedural safeguards to a person

who, as here, becomes a minister of religion after an initial classification other than IV-D.

Under the lower courts present ruling the local board is free to ignore a request for reclassification and therefore is in a position to seal the conviction of any priest, rabbi or reverend who does not meet its fancy without being required to meet the so-called "naked claim" head on with some competent probative evidence to the contrary, but only with suspicion and prejudice.

A reversal would only give petitioner an opportunity to prove his claim. If he *can* prove his claim then he is entitled to be classified IV-D; if he cannot, then he should report for civilian duty or go to jail.

The basic unfairness that is present here is that petitioner was not given an opportunity to prove his claim either before the administrative agency or before the courts.

Surely, if the law *is* that one must prove a "prima facie" case, then he must be given some forum within which to be heard and a reasonable opportunity to submit proof. Further, we submit that there should be a duty on the agency to request of the registrant the proof it deems necessary to establish a "prima facie" case.

If the registrant cannot meet a reasonable request for proof then he must fail; but, it should not be the rule that a registrant, after making a claim, is precluded because he didn't read the minds of the agency personnel or of the court in advance and tender the proof necessary to make such a "prima facie" case—when the registrant may well have had access to such proof at the time he made his claim. The Selective Service System is one where young unsophisticated laymen have as an adversary an

agency staffed with experts in the field. Rights which might accrue to a citizen under the Act should not be begrudingly given. This is foreign to both the concept and spirit of the Act.

The foregoing issues were raised below in petitioner's motion for judgment of acquittal, (A. 10).

Also by that motion petitioner raised the issues below that were created by the testimony of Helen Everling, Chief Clerk of Selective Service Area Office No. 11, who testified herein that the local board reconsidered the classification of petitioner on October 21, 1958 (A. 34). However, there is no record of this reconsideration contained in petitioner's selective service file (GX B3; A. 94), and petitioner received no notice of this alleged reconsideration. If what the witness testified to is true, then petitioner was denied due process of law. 32 C.F.R. §§1628.4, 1625.11, 1625.13 and 1625.14; *Stain* v. *United States*, 235 F 2d 339, 343 (9 Cir. 1956); *Olvera* v. *United States*, 223 F 2d 880 (5 Cir. 1955); *United States* v. *Vincelli*, 215 F 2d 210 (2 Cir. 1954); *Atkins* v. *United States*, 204 F 2d 269, 271 (10 Cir. 1953).

(b) In *United States* v. *Ransom*, 223 F 2d 15, 17 (7 Cir., 1955), the court said:

> "We think that the rule requiring a basis in fact for the action of the board in making the original classification, as announced in *Dickinson* and *Estep* is equally applicable to the action of the board in determining whether or not changed conditions justify a reopening of the registrant's classification and consideration of his claim to a different classification. The local board should not be able to escape the requirement of a basis in fact by simply refusing to reopen a registrant's file and consider it further. If a registrant makes a prima facie showing of right to

> a new classification, the board cannot refuse to give it to him unless it has at least a basis in fact for that refusal. We regard this as a necessary corollary to, if not the same as, the rule laid down in *Estep* and *Dickinson* cases • • •"

Here the lower court has held that petitioner did not confront the local board with a prima facie showing of his right to reclassification. We submit that petitioner did make a prima facie showing.

The "naked claim" doctrine that the Court of Appeals opinion of March 21, 1961 announces herein is a gross departure from the "basis in fact" doctrine heretofore announced by this court in Selective Service cases. See *Dickinson* v. *United States*, 346 U.S. 389, 74 S. Ct. 152 (1953).

The Second Circuit has stated that wherever a claim is made before an administrative agency, if not clearly frivolous, there should be a duty on the agency to accept it at face value or dispute it with competent and probative evidence. See *United States* v. *Vincelli*, 215 F. 2d 244 (2 Cir., 1954). Petitioner's claim surely cannot be termed "clearly frivolous".

The local board in this instance chose to ignore the registrant's claim and proof tendered in support thereof, made no attempt to disprove the claim and did not request further proof from the registrant, when they had nothing but their suspicion and prejudices to guide them in their denial of a reopening of defendant's classification. This may be administrative convenience; but, we submit, it falls short of the requirements of the due process clause of the Fifth Amendment to the Constitution of the United States.

The record herein is totally devoid of any probative evidence that is contrary to petitioner's claim to exemption as a minister of religion.

No reliance can be placed on the fact that in 1952 defendant struck out the section relative to ministers of religion in his classification questionnaire. At that time he was a mere lad of 19 and admittedly not a minister. However, that does not preclude the change in circumstances which took place over the next four years, or cast any doubt over the fact that in the interim period he had become a minister of religion.

Nor can any reliance be placed on a resumé of the proceedings at the January 15, 1957 meeting wherein it is stated that petitioner stated that he was a full-time employee in a restaurant that is operated by his religious sect. For, petitioner also stated that "all of his time was devoted to study and teaching of the religion of Islam when not working", and petitioner's sworn testimony belies the memorandum (A. 45). See *Dickinson* v. *United States*, 346 U.S. 389, 395. Also, two members of petitioner's sect who accompanied him to that meeting for the express purpose of testifying that petitioner was an assistant minister of their Temple were excluded from the hearing.

Likewise, no reliance can be placed on the fact that petitioner's father once served time in a federal prison, which the trial judge thought was significant enough to include in his memorandum opinion (A. 11).

Nor is there any magic in the fact that he did not immediately contest his 1-O classification. The simple fact is that he had finally gotten what he had requested and did not, at that time, realize that there was a ministerial exemption. It must be kept in mind that in 1956 defendant was a 23 year old layman who was without the benefit of legal counsel.

The record clearly shows that Local Board 48 gave no consideration to petitioner's letters of October 9, 1956, April 1, 1958 and October 31, 1958, nor did they give any consideration to the oral claim voiced by petitioner at the January 15, 1957 meeting. Furthermore, the record shows that the only attention given to petitioner's request for reclassification and ministerial exemption was that given by Lt. Col. Woodworth (A. 36, 37, 89, 90), and he admitted he had no basis in fact for his conclusions. Significantly the Government points to no "proof that is incompatible with the registrant's proof of exemption." Indeed the only items in the record pointed to in a futile attempt to establish some factual basis for the local board's action are two statements attributed to him that petitioner had some secular employment in 1956 and 1957. Secular employment does not preclude status as a minister. *Dickinson* v. *United States*, 346 U.S. 389 74 S. Ct. 152 (1953). Even more important, petitioner, without contradiction, denied making one of those statements (A. 49), and equally without contradiction described his work in the temple restaurant as limited to ten hours per week for which he received no compensation, while on his work in the temple itself he spent about forty hours per week (A. 45).

We submit that the facts of this case present an important question of federal law which has not been, but should be, settled by this Court.

2. Petitioner also raised the following issue by his motion for judgment of acquittal (A. 10) which was adversely decided by the lower courts.

As construed by the lower courts in its application herein 32 C.F.R. §1625.2 exceeds the legislative grant of authority to issue regulations pursuant to the Universal Military Training and Service Act. It exceeds that grant be-

cause it fosters a situation wherein an administrative official can, without any reasonable standards to guide his determination, refuse to reopen the classification of one who becomes a minister and therefore should be entitled to the benefits of the statutory exemption, and who, in fact, notifies the local board of this change.

The court has always looked with disfavor upon any situation wherein First Amendment Freedoms were left to the whim or caprice of administrative officials. Cf. *Niemotko* v. *Maryland*, 340 U.S. 268, 71 S. Ct. 325 (1951), and cases cited therein.

There can be no doubt that petitioner claims to be a minister of religion in what could reasonably be termed the most unpopular religious group in the world. However, the law is a two edged sword and if we don't protect the rights of the unpopular, we pave the way to our own destruction; for, what is popular today may not be so tomorrow.

The total inaction by the local board after it knew that petitioner was claiming to be a minister of religion is living testimony of its prejudice. There is no way that the local board can claim that the issue was unknown to it in light of the three letters sent to it, the verbal claims made to it, the tender of witnesses with personal knowledge, and the first trial of 57 CR 532 wherein peittioner defended against a void selective service order, in part, on the ground that he was a minister of religion—a trial within which the local board took an active interest.

Under the present ruling of the lower courts, the local board is able to place an uneven burden on certain registrants as to what it will require before reopening a classification without being required to meet every claim head-on with some competent probative evidence to the contrary.

We respectfully submit that unequal and arbitrary administrative action with respect to petitioner's claim of ministerial exemption under the Universal Military Training and Service Act constitutes an interference with the freedom of religious worship guaranteed by the First Amendment to the Constitution of the United States. Unless all ministers of every creed and religious faith are treated alike by federal officers, those discriminated against as the petitioner has been here are as surely victims of religious persecution as though they had been singled out on the basis of their creed by legislative fiat. It has never been doubted in the United States that preference of one religion over another by statute would violate our constitution. See *Everson* v. *Board of Education*, 330 U.S. 1, 8-16 (1947). It is equally true, we submit, that administrative and judicial action which discriminate against a particular religion runs afoul of the constitution. *Shelly* v. *Kraemer*, 334 U.S. 1 (1948); *Hurd* v. *Hodge*, 334 U.S. 24 (1948).

3. Another important question that should be settled by this court was raised below on petitioner's motion to dismiss (A. 8) and grows out of the fact that the indictment under which petitioner now stands convicted is based on an order to report for civilian duty which was issued at the request of the prosecution at a time when petitioner was free on bond awaiting a new trial on a previous similar indictment which was based on an order found by the trial judge to be void. Thus, the prosecution neatly placed the petitioner in the dilemma of violating his bond or disobeying the order to report, which situation subjected petitioner to two mutually inconsistent commands of the same sovereign and deprived him of the ability to formulate any criminal intent herein.

The District Court of California has held that detention by the United States Government for other reasons was a defense to a prosecution for failure to report pursuant to an induction notice issued by a Selective Service Board because such a procedure would be without due process of law in that the same sovereign was forcing the defendant to do two conflicting things. See *United States* v. *Massaki Kuwabara,* 56 F. Supp. 716 (D.C. Cal., 1944), which was expressly overruled by the Ninth Circuit Court of Appeals in *Takeguma* v. *United States,* 156 F. 2d 437, 441 (1946).

However, we submit that the above tactics of the prosecution transgressed the limits of fairness inherent in the due process clause of the Fifth Amendment to the Constitution and that this question should be settled by this court.

4. Although on the face of it, Title 28, §1733 U.S.C. purports to make documents, which ordinarily would be excluded from evidence as hearsay, admissible; there should be a limit as to what reasonably can be admitted, especially in criminal cases. We submit that when the district court, over the objection of petitioner, admitted in evidence an unsigned resumé of investigation (GX B24; A. 61) which contained prejudicial second degree hearsay information not only as to petitioner but also as to petitioner's father, upon which apparently the district judge placed some importance (A. 11), that the trial court exceeded that limit. See *Yung Jin Teung* v. *Dulles,* 229 F. 2d 244 (2 Cir., 1956); *Michael* v. *John Hancock Mutual Life Ins. Co.,* 334 P. 2d 1090, 1093 (Colo., 1959).

5. The local board allowed a military officer to dominate the proceedings of the January 15, 1957 meeting with respect to petitioner (A. 29, 37) despite the provisions

of 50 U.S.C. App. §460 (2) (b) (3) which limit the President's right to use members of the armed forces in the administration and civilian local boards of the Selective Service system. Col. Woodworth's participation at the meeting, as shown by the record, far exceeded the mere duty of calling petitioner's attention to the penalty for violation of the Act. His domination of the meeting deprived petitioner of an opportunity to reasonably press his claim for ministerial exemption before the board because Col. Woodworth's actions limited the authority of the civilian local board and deprived it of its independent judgment. This too was urged below by petitioner in his motion for judgment of acquittal (A. 10).

The Sixth Circuit has intimated that such conduct would violate the Act and deny the registrant due process although the case before it did not present facts sufficient to warrant that conclusion. *Julian* v. *United States*, 236 F. 2d 155, 158 (6 Cir., 1956).

6. The doctrine of limited judicial review in selective service cases should not prevent the admission of evidence upon a trial which was tendered to but ignored by the local board. Such a procedure would foster a situation wherein a non-judicial body could determine in advance of trial what it would allow the judicial system to consider. By playing the role of the ostrich, the local board could stifle an attempted prove-up of a registrant's claim and limit the registrant to his so-called "naked claim", as here, thereby preserving the image that they were not arbitrary in their refusal to reopen the classification because they were not faced with a registrant who made a *prima facie* case.

"There is something alien to our sense of justice and right that the order of an administrative body of laymen,

the factual basis of which cannot be inquired into by a court or jury, in effect, by depriving him of a jury trial on the question of his guilt or innocence, makes a felon of a civilian and deprives him of his liberty.

"As long, therefore, as the law stands as it is now written and construed, it is and will continue to be of the first importance that the predicate for such conviction without trial by jury be at the least laid with the utmost fidelity • • •" *Olvera* v. *United States*, 223 F. 2d 880, 884 (5 Cir., 1955).

If the Government's contention is sound and the doctrine of limited judicial review precludes this petitioner from demonstrating that the statute which he is charged with violating does not in fact apply to him, then the doctrine of the *Estep* case would deny to this petitioner both due process of law and the equal protection of the law. The Universal Military Training and Service Act would have to be held unconstitutional as applied to this petitioner. *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 597, 73 S. Ct. 472, 478 (1953); *Olvera* v. *United States*, 223 F. 2d 880 (C.A. 5, 1955); *United States* v. *Peterson*, 53 F. Supp. 760 (D.C. Cal., 1944). But this court need not go so far to provide petitioner the relief prayed. We submit that the *Estep* doctrine has no application where, as here, a local board has systematically refused even to consider a claim of ministerial exemption.

We submit, therefore, that the District Court erred to the prejudice of the petitioner when it excluded from evidence the tender of proof of what the witness, Raymond Sharrieff, knew of defendant's official connection with the Temple of Islam of January 15, 1957 when he accompanied petitioner to a meeting of the local board and was excluded from the hearing room (A. 44).

We further submit that when a local board takes no action in order to test the validity of a claim for reclassification, as the record shows is the case here, that by its inaction it ousts itself of jurisdiction unless there exists a basis in fact that would warrant such inaction; and, having done so, it would be proper upon a trial for the court to admit evidence relevant to the registrant's claim. Therefore, we respectfully urge that the District Court erred to the prejudice of the petitioner when it excluded from evidence petitioner's tender of proof as to petitioner's ministerial status at all times material herein (A. 39-44, 47, 48).

7. The trial court erred to the prejudice of petitioner by allowing the government's motion to consolidate 57 CR 532 and 59 CR 64 for trial over the objection of petitioner (A. 9) because the net effect was a denial to petitioner of a jury trial in that the facts involved herein would tend to confuse and confound a jury upon a consolidated trial. Therefore, the petitioner herein was virtually forced into waiving a trial by jury.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM R. MING, JR.,
GEORGE N. LEIGHTON,
ELLIS E. REID,
Counsel for Petitioner.

APPENDIX A.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1960 — JANUARY SESSION, 1961

No. 13096

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WALLACE DELANEY MOHAMMED,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 21, 1961

Before HASTINGS, *Chief Judge*, and KNOCH, *Circuit Judge*, and MERCER, *District Judge*.

MERCER, *District Judge*. Defendant was convicted at a trial without a jury of violation of the Universal Military Training and Service Act, 50 U.S.C.A. App. §451, *et seq.*, by reason of his refusal to report for civilian work as ordered by his local selective service board. He now appeals the judgment of conviction, asserting several contentions of error which principally hang from the common thread of his contention that he is now a minister of his religious sect.

Defendant is a Muslim, a devotee of the Islamic Religion. He registered with the local board in November, 1952. In his selective service questionnaire, filed with the local

board in December, 1952, he claimed that he was a conscientious objector to participation in war. The local board classified him 1-A. As the result of an appeal, defendant was classified 1-O by the Illinois Appeal Board on May 9, 1955. Because of a procedural irregularity which preceded that classification, defendant's file was reconsidered by the appeal board and he was again given a 1-O classification on June 6, 1956.

The 1-O classification made defendant subject to induction, pursuant to order of the local board, for civilian work of national importance. Defendant raised no objection to the 1-O classification as he might have done when he was notified thereof on or about June 6, 1956. Instead, his dissension against the classification began on October 9, 1956,[1] at the earliest, and after the local board had begun processing his file for his induction into civilian work.

That dissension blossomed into a claim that defendant was a minister of his sect and entitled to exemption from the provisions of the Act. He defended the criminal charge upon that claim of exemption and his major contentions against the judgment on this appeal are related thereto.

A principal contention advanced by defendant for reversal of the judgment is that the order to report for civilian work is void because the local board failed to reopen defendant's classification and grant him a hearing upon his alleged claim of entitlement to the ministerial exemption. Before we consider that contention, and before we allude in detail to the historical background of defendant's indictment and conviction, we will dispose of a second major contention that the trial court erroneously excluded evidence offered by defendant in support of the merits of his claim of his ministerial status.

The statutory provision making decisions of the local boards "final" precludes the courts from weighing the evidence to determine whether the classification given to

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[1] See note 8, infra.

a particular registrant was justified. "The decisions of the local board made in conformity with the regulations are final even though they may be erroneous." *Estep* v. *United States*, 327 U.S. 114, 122. The court may interfere with the classification given to a registrant by a local board only if it finds that there is no basis in fact for the classification given, or if it finds that the board acted so arbitrarily and capriciously that due process of law is denied. *Witmer* v. *United States*, 348 U.S. 375; *Dickinson* v. *United States*, 346 U.S. 389; *Estep* v. *United States*, *supra*. "The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." *Estep* v. *United States*, *supra* at 122-23.

The courts may not sit as super draft boards, substituting their judgment on the weight of evidence for the judgment of the designated selective service agencies. *Witmer* v. *United States*, *supra* at 380-81. Where the claim is made that a particular classification was denied by the local board, it is not the function of the court to determine whether the registrant is, in fact, entitled to the classification which he claims. The court's function, in that respect, is limited to a review of the file upon which the selective service agencies acted to determine whether a basis in fact exists for the classification given. *Estep* v. *U. S.*, *supra*. The court properly excluded the evidence which was relevant only to the merits of defendant's claim of ministerial status. See *Smith* v. *United States*, 4 Cir., 157 F.2d 176, cert. denied 329 U.S. 776, in which the conviction of a registrant who claimed ministerial status was reversed on the ground, *inter alia*, that the trial judge had permitted the issue of the defendant's status as a minister to be tried before the jury.

Defendant's principal contention is that he was denied due process of law and procedural fairness because, as he alleges, the local board failed to reopen his classification and to consider his claim of entitlement to a ministerial exemption. The merits of that contention must be considered upon the basis of the historical background of

defendant's asserted claim of exemption as reflected in his selective service file.

In his classification questionnaire, submitted to his local board in December, 1952, defendant struck out the section relative to ministers of religion. He claimed that he was a conscientious objector to participation in war, a claim which was recognized by the selective service agencies when defendant was given a 1-O classification by the appeal board on June 6, 1956.

Defendant's file was returned to the local board contemporaneously with the appeal board order of June 6, 1956. On June 11, 1956, the local board wrote to defendant requesting that he designate three types of civilian work which he was willing and qualified to do. SSS Form 152 was enclosed with that letter for defendant to complete and return to the board. When no response was received from defendant, the board mailed follow-up letters including a letter of October 1, 1956, renewing the request that he complete and return SSS Form 152. Defendant made no response to these letters until October 9, 1956.

On the latter date, defendant advised the board, by letter, that he was devoting all of his time to work for the Temple of Islam in Chicago.[2] That letter was his first contact with the board subsequent to his receipt of notice of his 1-O classification. The file reveals no specific reply by the board to the October 9 letter, but on October 23, 1956, defendant was again requested, by letter, to complete and return SSS Form 152. When no response was received from defendant, the clerk of the local board advised him, by letter dated January 3, 1957, that he should meet with the local board on January 15, 1957, at which time a representative of the office of the State Director would aid the board and defendant in reaching an agreement as to the type of civilian work to which defendant would be assigned. The defendant attended the January 15th meeting, at which time he stated that he "definitely" would not participate in the civilian work program be-

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[2] See note 8, infra.

cause it would interfere with his activities in conjunction with the Temple.[3]

Thereafter, on February 11, 1957, defendant was ordered to report to the local board on March 4, 1957 for assignment to Elgin State Hospital. He refused to report.[4] An indictment[5] was returned by the August, 1957 grand jury charging defendant with a violation of the Act by his refusal to report for civilian work pursuant to the February 11th order.

While that indictment was pending, on April 1, 1958, defendant wrote to the State Director stating that "I was

[3] "Registrant stated he has been under religious training all his life; and is sworn to devote his work and life only to Allah. He is a full-time employee in a restaurant that is operated by his religious sect namely The Temple Restaurant at 71st Street and St. Lawrence Avenue, Chicago, Illinois. He stated that he couldn't possibly have any time for any other employment. [When advised that he might be sent to prison if he refused to comply with the Act], Registrant stated 'if that was Allah's wish there wasn't anything he could do about it.' * * * the registrant stated definitely that he was not willing to participate in the Civilian Work Program in any way. * * * He explained that all his time was devoted to study and teaching of the religion of Islam when not working." Excerpt from "Memorandum of Information Received at Board Meeting" on January 15, 1957.

Two members of defendant's religious sect accompanied defendant to the January 15th meeting, but were excluded from participation in that meeting. At the trial defendant offered to prove by these persons that they would then have testified that defendant was an assistant minister of his Temple. That meeting was necessary because defendant had refused to cooperate with the local board and designate civilian work which was acceptable to him. The meeting was held for the express purpose to enable a representative of the State Director to aid the board and defendant in reaching agreement upon that subject. The question of classification was not before that meeting and the persons who accompanied defendant were properly excluded from that meeting.

[4] On March 5, 1957, he gave the local board the following statement over his signature: "I am reporting to the Local Board to let the Board know I am of the same opinion. And refuse to accept any work."

[5] No. 57 CR 532.

and am a student for the ministry at the University of Islam, and an assistant minister in our temple" since "shortly after I filed my Classification Questionnaire on December 18, 1952."[6] On April 10, 1958, Lt. Colonel Woodworth, for the State Director, advised defendant that a review of his file failed to reveal any evidence supporting his claim for a ministry student or ministerial exemption.

A trial on indictment No. 57 CR 532 was concluded May 20, 1958. A verdict of guilty was set aside and a new trial ordered on September 11, 1958, for the reason, as the Court found, that the February 11, 1957 induction order was signed only by the clerk of the local board and defendant's file contained no record that the order was issued by the board itself.

Thereafter, on October 21, 1958, the board issued a new order directing defendant to report on November 3, 1958, for work at the Elgin State Hospital. By his letter to the local board, dated October 31, 1958, defendant requested reclassification and a hearing before the local board in order to present proof of his claim, then asserted, of ministerial status.[7]

Ultimately, on November 10, 1958, the local board, by letter, advised defendant that no further action would be taken in his case. In the meantime, defendant refused to report to the local board on November 3, 1958 for work at the Elgin State Hospital. At that time defendant signed a statement, "I refuse to perform any work that will take me from my duties to Allah." The indictment, No. 59 CR 64, upon which defendant was convicted was then returned, predicated upon his refusal to obey the order of October 21, 1958.

That cause was consolidated with indictment No. 57 CR 532 for trial before the court without a jury. At the close of the government's case in chief, upon defendant's motion, a judgment of acquittal was entered as to No. 57 CR 532. Defendant was found guilty as charged in in-

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[6] See note 9, infra.

[7] See note 10, infra.

dictment No. 59 CR 64 and, after his post-trial motions were overruled by the court, was committed to the custody of the Attorney General for a period of three years.

Defendant relies upon the letters of October 9, 1956, April 1, 1958, and October 31, 1958, to substantiate his contention that he was denied due process by the local board's failure to reopen his classification. Because of the emphasis placed upon these letters, each is hereinafter fully set forth in the margin with appropriate footnote references.

The letter of October 9, 1956,[8] to the local board did not,

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[8] The full text of that letter is as follows:

"I am sorry for the delay of this letter. My time has been consumed in the services of of (sic) the Temple of Islam No. 2. I have taken full responsibility of being a full time worker for the Temple of Islam. I have dedicated my life to the services of Islam. I am preparing myself in the hopes to become a Religious Teacher of Islam.

"The Temple of Islam is depending on its Muslims for support in every way. I couldn't possibly work successfully for any other organization. I have willingly pledged twelve to sixteen hours of every day to help benefit the Temple of Islam in any way it finds necessary.

"The Temple of Islam is supporting a private school for children and it has contributed much to better the life of American so-called Negroes.

"The Message of Islam from Allah taught by our Leader, Honorable Elijah Mohammed, has changed Alcoholics, Dope Addies (sic) and thieves to sincere and desirable Muslims.

"This is not only a services (sic) and contribution to the so-called Negroes who join the Temple, but is also a great contribution to the Government of the United States.

"If there is a Religious Group or any kind of organization needing my services it is the Religious Group of which I am a part.

"My life and my death is all for Allah. I sincerely hope the Board will consider the work I am doing as a necessity in my life. Knowing the Temple of Islam receives no aid whatsoever from other than the Muslims belonging to it I could not do very well as a worker for any other Organization.

"In closing this letter I seriously hope the Board will consider my duty to Allah and my devoted services to the Religious Islam."

as defendant now contends, claim ministerial status or request a reopening of defendant's classification. Defendant stated that he was then devoting his time to "the services of the Temple of Islam" and "to help benefit the Temple of Islam in any way it finds necessary." To the extent that that letter requested anything of the board, it contained the expressed "hope" that "the Board will consider the work I am doing as a necessity in my life," and that "the Board will consider my duty to Allah and my devoted services to the Religion Islam." In this context, the letter advised the board that "I couldn't possibly work successfully for any other organization" and "Knowing that the Temple of Islam received no aid whatsoever from other than the Muslims belonging to it, I could not do very well as a worker for any other organization."

The letter of April 1, 1958, to the State Director stated a naked claim that "I was and am a student for the ministry at the University of Islam, and an assistant minister in our temple" since shortly after December 18, 1952, when "I filed my Classification Questionnaire". The validity of that naked claim is stated to be shown by "the Hearing Officer's Resumé Investigative Report of December 20, 1954, and my letter to your office (*sic*) dated October 9, 1956."[9]

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[9] The full text of that letter is as follows:

"I, Wallace Delany Mohammed, hereby apply to have you reconsider my classification under the Selective Service Act and permit me to submit evidence for your consideration in arriving at a proper classification.

"In support of this application, I wish to point out that since shortly after I filed my Classification Questionnaire on December 18, 1952, as the Hearing Officer's Resume Investigative Report of December 20, 1954, and my letter to your office dated October 9, 1956, both show, I was and am a student for the ministry at the University of Islam, and an assistant minister in our temple.

"The letter from Mr. T. Oscar Smith, Special Assistant to the Attorney General of the United States to the Chairman of the Appeal Board for the Northern District of Illinois, stated that I had attended and was still in attendance at the University of Islam studying the Religion of Islam. No attention was given

(Appendix)

Defendant's letter of October 31, 1958, addressed to the local board requested reconsideration of his classification because "I am a minister of the Temple of Islam".[10] Reference is made to "my letter of April 1, 1958, to the Illinois State Director" to substantiate his claim of ministerial status.

Assuming, *arguendo*, that the letters of April 1, 1958, and October 31, 1958, were timely to invoke the authority of the local board to reopen defendant's classification,[11]

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[9] (continued)
this matter, and in spite of the report and advice given to the Hearing Officer by others, he improperly recommended that I be classified as a conscientious objector.

"On October 9, 1956, I informed the Local Board that I was actively and continuously engaged in training for the ministry and ministerial work. My status as a ministerial student and assistant minister has not been acted upon.

"Since I am sure that your office is interested in and dedicated to the proper classification of registrants, I respectfully apply for a hearing relative to a proper reclassification under the Selective Service Act."

[10] The full text of that letter is as follows:

"This is to acknowledge receipt on October 22, 1958, of an order to report for civilian work at 9:00 A.M., on November 3, 1958.

"Reference is made to my letter of April 1, 1958, to the Illinois State Director of the Selective Service System a copy of which was sent to you. At that time and continuously since that time I was and am a minister of the Temple of Islam. This information has been brought to your attention on innumerable occasions in the last two years.

"I am now again requesting you to reconsider my classification. Accordingly I hereby request a hearing before the Local Board at whatever time may be convenient to it in order to present additional proof of my ministerial status.

"In this connection your attention is directed to the fact that under the Selective Service Act ministers are exempt. I am such a minister.

"Thanking you for your attention to this matter, I am * * *."

[11] As to the letter of April 1, 1958, the assumption stated includes the assumption that action by the local board was requested by that board's receipt of a copy, only, of a letter addressed to the State Director.

notwithstanding the pendency, in the one instance, of an indictment predicated upon violation of an induction order, and, in the second instance, of an outstanding induction order,[12] we cannot say that the board acted arbitrarily or capriciously in refusing to reopen defendant's classification.

The Act requires every male person within the specified age limits to register and, upon orders of the local boards, to submit to induction. As a matter of legislative grace, "Regular or duly ordained ministers of religion" are exempt from training and service. 50 U.S.C.A. App. §456 (g). Before he is entitled to exemption, "Each registrant must satisfy the Act's rigid criteria for the exemption. * * *. And since the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption." *Dickinson* v. *United States*, 346 U.S. 389, 395. In the context in which *Dickinson* speaks, *i.e.*, the sufficiency of evidence submitted to overcome the finality of a classification order, the burden of establishing a right to exemption is discharged when the registrant has submitted proof which, *prima facie*, shows his entitlement to the classification claimed. *Ibid*, at 397; *Witmer* v. *United States*, 348 U.S. 375, 382.

Regulation S.S. 1625.2, which governs the reopening of a registrant's classification requires that any request for reopening be accompanied by written information not previously considered by the board which, *prima facie*, would entitle the registrant to the classification claimed. That regulation provides, in pertinent part:

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[12] In this respect the Regulations provide that a local board may reopen a classification under certain circumstances but "the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * *, unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." 32 C.F.R. Sec. 1625.2.

"The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; * * *." 32 C.F.R. §1625.2

Thus, defendant did not, as he seems to contend, have an absolute right to have his classification reopened and reconsidered upon a mere naked request, unsupported by any written evidence in support of his claim. His only reference to evidentiary support for his claim was to the resumé report of the Hearing Officer which had been considered by the appeal board in fixing the 1-O classification. As the Court pointed out in *Witmer* v. *United States*, 348 U.S. 375, 381, status as a minister is susceptible of proof by the objective facts of the registrant's activities. The least that defendant could have done to satisfy the Act's rigid criteria of which the *Dickinson* opinion speaks was to submit written evidence of objective facts in support of his claim of exemption, in strict accordance with the regulation which implements the Act.

Moreover, defendant cannot, as he tends to do, ignore the fact that the April 1st letter was addressed to the State Director by now asserting that the local board should have then reopened his classification. The State Director did then review defendant's file. Defendant was advised by letter from the State Director dated April 10, 1958, that the Hearing Officer's Report had been considered in fixing the 1-O classification, that defendant's letter of October 9, 1956, had been reviewed and that the file, as thus constituted, contained no evidence that defendant was entitled to the classification claimed.

Upon receipt of that advice, defendant made no attempt to submit written proof of facts showing his entitlement to the claimed exemption. Instead, he waited until October 31, 1958, three days before he was to report for assignment to Elgin State Hospital to reassert his naked claim

by a letter, with reference only to his letter of April 1, 1958, as substantiation of the merits thereof. The board had no authority to reopen defendant's classification at that time. An order to report for civilian work had been mailed to defendant on October 21, 1958, and the board could, therefore, reopen the classification only upon the basis of a specific finding of "a change in the registrant's status resulting from circumstances over which the registrant had no control." S.S. 1625.2, 32 C.F.R. Sec. 1625.2.

The selective service agencies were here presented with the file of a registrant who had expressly disclaimed ministerial status in his classification questionnaire. His claim of conscientious objector status had been granted upon file information, *inter alia*, that he was attending the University of Islam, a private school operated by his sect, in a curriculum which included religious instruction. He had attended the same school since the age of seven years as the trial judge so aptly pointed out in his memorandum. He expressed no dissatisfaction with the 1-O classification given on June 6, 1956, until after the local board had begun processing his file for his induction into civilian work of national importance. He was advised within five days after his 1-O classification that civilian work was contemplated to be ordered. He still remained silent for approximately four months until October 9th. He then advised the local board that he could not work for any other organization because he was serving the Temple of Islam "in any way it finds necessary." At the meeting on January 15, 1957, he stated that he was working full time in a restaurant operated by his sect. He did state that he was devoting his spare time to study and teaching of the religion of Islam,[13] but still did not submit any written evidence of any change in his status, as reflected by the evidence in his file at the time the 1-O classification was given. Instead, he waited until he had been indicted for disobedience to an order to report for work. On the eve of his trial on that indictment, his letter of April 1, 1958,

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[13] See note 3, supra.

asserted to the State Director that the same evidence which had been previously considered by the appeal board showed that he had been a student for the ministry of Islam since shortly after December 18, 1952, a claim which he then asserted for the first time. He might yet have submitted proof to substantiate his claim, but did not do so. After a new trial had been ordered upon the 1957 indictment, and after a new order to report for assignment to civilian work had been entered, he wrote his letter of October 31, 1958, claiming that he was, and had been since April 1, 1958, a minister of the Temple of Islam. He received a prompt response to each the April 1, 1958 and October 31, 1958, letters from the agency to which the letters had been respectively addressed.

The board was not arbitrary in its refusal to reopen defendant's classification upon the record in this case. In addition to the rationale upon the principles stated in *Dickinson*, to which we have previously alluded, our conclusion finds support in the following cases, among others. *Witmer* v. *United States*, *supra* at 383-384; *United States* v. *Diercks*, 7 Cir., 223 F. 2d 12, cert. denied 350 U.S. 841; *United States* v. *Smith*, E.D. Ill., 124 F. Supp. 406, 409, aff'd *United States* v. *Hoepker*, 7 Cir., 223 F. 2d 921, cert. denied 350 U.S. 841; *Frank* v. *United States*, 9 Cir., 236 F. 2d 39, 43-44.

Defendant's reliance upon *United States* v. *Vincelli*, 2 Cir., 215 F. 2d 210, *United States* v. *Craig*, 3 Cir., 207 F. 2d 888, *Smith* v. *United States*, 4 Cir., 157 F. 2d 176, cert. denied 329 U.S. 776, and *Chih Chung Tung* v. *United States*, 1 Cir., 142 F. 2d 919, is misplaced. Each of those cases involved a denial of procedural fairness in a hearing before a local board or a denial of the right to appeal a classification given.

Likewise, neither *United States* v. *Ransom*, 7 Cir., 223 F. 2d 15, nor *Olvera* v. *United States*, 5 Cir., 223 F. 2d 880, upon which defendant relies, is in point. In *Ransom*, we held that due process of law was denied by a local board's refusal to reopen Ransom's 1-O classification in the face

of *prima facie* proof submitted by Ransom that he was a minister. *Olvera* was reversed, *inter alia*, upon the ground that the local board had acted arbitrarily in refusing to reopen a classification "because we don't have to", notwithstanding evidentiary support for the classification claimed.

Defendant next contends that his right of freedom of religion was violated by both the administrative and judicial procedures in this case. We reject that contention. The record does not disclose any discrimination against defendant by either the selective service agencies or the District Court. His file was processed pursuant to the Act and established regulations. The procedure employed in the trial court was in accordance with the standards of judicial procedure. The fact that defendant's predisposition to devote his time to his sect might be disturbed by the duties imposed by the selective service laws merely epitomizes the harsh reality of the age in which we live, when military conscription is necessary to the national defense.

Freedom to believe and adopt one's chosen form of religion is an absolute right, but freedom of action in following one's concept of religion "is subject to regulation for the protection of society". *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304. There is here no interference with defendant's right to adopt and believe the religion of his choice. To the extent that his freedom of desired action in the practice of his religious faith is curtailed, that curtailment is a permissible result of the selective service laws adopted and enforced for the protection of the nation. *Warren* v. *United States*, 10 Cir., 177 F. 2d 596, 598-600, cert. denied 338 U.S. 947.

Finally, we have considered and we reject other contentions of defendant without specific comment except as follows. Documents properly identified as a part of defendant's selective service file upon which the local board and the appeal board had acted were properly admitted in evidence and considered by the court. The record dis-

closes no improper influence by Lt. Colonel Woodworth with the action of the local board by his participation as a representative of the State Director in the January 15, 1957, meeting of the local board with defendant. That meeting was held for the single purpose of making a determination whether a work assignment could be found which defendant would accept. Although it appears that Col. Woodworth did most of the talking at that meeting, the question of defendant's classification was not before the board. The participation of Col. Woodworth at that meeting was not a violation of the Act.[14] *Julian* v. *United States*, 6 Cir., 236 F. 2d 155, 158-159.

The judgment is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[14] 50 U.S.C.A. App. Sec. 460 (b), (2), (3).

APPENDIX B.

STATUTES

Title 50, Appendix, §456, United States Code Annotated; [page 284]:

(g) Regular or duly ordained ministers of religion, as defined in this title [sections 451-454 and 455-471 of this Appendix], and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title [said sections].

• • • • •

Title 50, Appendix, §456, United States Code Annotated; [page 286]:

(j) Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be

assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may

deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix].

• • • • •

Title 50, Appendix, §460, United States Code Annotated; [page 375]:

(b) The President is authorized—

• • • • •

(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title [said sections], together with such other duties as may be assigned under this title [said sections]. He shall create and establsh one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and possession of the United States, and in the District of Columbia. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials: *Provided*, That an intercounty local board consisting of at least one member from each component county or corresponding subdivision may be established for an area not exceeding five counties or political subdivisions corresponding thereto within a State or comparable jurisdiction when the President determines, after considering the public interest involved and the recommendation of the governor or comparable executive official or officials, that the establishment of such local board area will

result in a more efficient and economical operation. Any such intercounty local board shall have within its area the same power and jurisdiction as a local board has in its area. No member of any local board shall be a member of the armed forces of the United States, but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, and each intercounty local board shall have at least one member from each county or political subdivision corresponding thereto included within the intercounty local board area. Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title [said sections], of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. There shall be not less than one appeal board located within the area of each Federal judicial district in the United States and within each Territory and possession of the United States, and such additional separate panels thereof, as may be prescribed by the President. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [said sections], and the determination of the President shall be final. No per-

son who is a civilian officer, member, agent, or employee of the Office of Selective Service Records or the Selective Service System, or of any local board or appeal board or other agency of such Officer or System, shall be excepted from registration or deferred or exempted from training and service, as provided for in this title [said sections], by reason of his status as such civilian officer, member, agent, or employee;

• • • • •

Title 50, Appendix, §466(g), United States Code Annotated; [page 478]:

• • • • •

"(1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordain-

ed a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

* * * * *

Title 28, §1733, United States Code Annotated; [page 486]:

Government records and papers; copies

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof. June 25, 1948, c. 646, 62 Stat. 946.

ADMINISTRATIVE REGULATIONS

32 C.F.R., Chap. XVI §1625.1, [page 330]:

Classification not permanent.

(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writ-

ing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

32 C.F.R., §1625.2:

"When registrant's classification may be reopened and considered anew.

The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control. (E. O. 10594, 20 F. R. 740, Feb. 3, 1955)"

(Appendix)

§1625.4 *Refusal to reopen and consider anew registrant's classification.* When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

§1625.11 *Classification considered anew when reopened.* When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

§1625.12 *Notice of action when classification considered anew.* When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter.

§1625.13 *Right of appeal following reopening of classification.* Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

§1625.14 *Order to report for induction to be canceled when classification reopened.* When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

WALLACE DELANEY MOHAMMED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
[illegible],
Assistant Attorney General,
[illegible],
[illegible],
[illegible],
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 126

WALLACE DELANEY MOHAMMED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 96-108; Pet. App. A, 1-15) is reported at 288 F. 2d 236. The opinion of the district court (R. 9-22) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1961 (R. 109). A petition for rehearing was denied on May 1, 1961 (R. 110). The peti-

tion for a writ of certiorari was filed on May 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the local selective service board erred in refusing to reopen the petitioner's classification and to classify him as a minister of religion.
2. Whether the district court erred in various rulings made at the trial.
3. Whether the local board properly issued an order for the petitioner to report for civilian work of national importance.

STATUTE, REGULATIONS AND RULE INVOLVED

Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j), provides in pertinent part:

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title (said sections), be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) * * * such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may

> deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed * * * to have knowingly failed or neglected to perform a duty required of him under this title * * *.

Selective Service Regulation 1625.2, 32 C.F.R. (Cum. Supp., 1961) 1625.2, provides in pertinent part:

> The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; * * * provided, * * * the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * or an Order to Report for Civilian Work * * * unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

Selective Service Regulation 1625.4, 32 C.F.R. 1625.4, provides in pertinent part:

> When a registrant * * * files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen

> the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submited does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. * * *

Selective Service Regulation 1660.20(c), 32 C.F.R. 1660.20(c), provides in pertinent part:

> If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement.

Rule 13, F. R. Crim. P., provides:

> The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendant if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

STATEMENT

In the District Court for the Northern District of Illinois, the petitioner, having waived a jury trial, was convicted of having willfully failed to report in 1958 to the Elgin State Hospital, for civilian work of national importance, as directed by his local draft board—in violation of Section 6(j) of the Universal

Military Training and Service Act, 50 U.S.C. App. 456(j), *supra*, pp. 2-3 (R. 6, 7). Petitioner was sentenced to three years' imprisonment (R. 23, 24). On appeal, the conviction was unanimously affirmed (R. 96-108; Pet. App. A, 1-15).

The pertinent facts may be summarized as follows:

The petitioner, who is a member of the Muslim Cult of Islam in the United States, registered in 1952 and claimed to be a conscientious objector because of his religious beliefs (R. 94). The local board rejected his claim, but, after appeal, the Department of Justice recommended that the petitioner be reclassified I-O, as a conscientious objector to be assigned to civilian work (R. 13, 63), and on May 4, 1955, the appeal board reclassified the petitioner I-O. In February 1956, in connection with petitioner's classification as a conscientious objector, the local board requested him to complete SSS Form No. 152, indicating his preferences among three types of approved civilian work, together with his work experience, abilities and interests. On March 2, 1956, the petitioner returned the form stating that he would do slum clearance work in Baltimore, Maryland; would work for the "Childrens Aid Society" in Neffsville, Pennsylvania; or the "Mexico Welfare Home" in Carlisle, Pennsylvania (R. 94, 95).

In March 1956, the state headquarters of the Selective Service System wrote the local board that it believed that the appeal board's action in reclassifying the petitioner was not a "legal classification" because it failed to allow the petitioner to make a reply to the Department of Justice recommendations even though

the Department "recommended that the [petitioner's] claim be sustained" (R. 30, 63; see R. 51-52). Thereafter, the proceedings were reopened and petitioner was classified as I-O (R. 13).

On June 11, 1956, the local board mailed to the petitioner another SSS Form No. 152 and noted that, if he desired employment with an agency other than an Illinois State mental hospital, he should make his own arrangements, present a letter of acceptance to the local board from the agency concerned, and seek approval (R. 66, 94). No reply was received by the local board. In September 1956, the board again requested the petitioner to complete and submit Form 152 (R. 67, 94). No reply was received. On October 1, 1956, the local board submitted three types of work at the State Mental Hospital, Elgin, Illinois, to the petitioner, and requested him to "submit the kind of work [which he was] willing to accept" (R. 68, 94). On October 9, 1956, the petitioner mailed a letter to the local board which read in part (R. 13-14, 93):

> I am sorry for the delay of this letter. My time has been consumed in the services of the Temple of Islam No. 2. I have taken full responsibility of being a full time worker for the Temple of Islam. I have dedicated my life to the services of Islam. I am preparing myself in the hopes to become a Religious Teacher of Islam.
>
> The Temple of Islam is depending on its Muslims for support in every way. I couldn't possibly work successfully for any other organization. I have willingly pledged twelve to six-

teen hours of everyday to help benefit the Temple of Islam in anyway it finds necessary.

* * * *

My life and my death is all for Allah. I sincerely hope the Board will consider the work I am doing as a necessity in my life. Knowing the Temple of Islam receives no aid whatsoever from other than the Muslims belonging to it I could not do very well as a worker for any other Organization.

* * * *

In October and November 1956, the local board again submitted to petitioner three types of work at the State Mental Hospital, Elgin, Illinois, and requested him to choose the type of work which he was "qualified and willing to do" (R. 70, 71, 94). Petitioner did not reply to these letters. On January 3, 1957, the board wrote the petitioner that he should attend a board meeting on January 15, 1957, at which time a representative from the office of the State Selective Service Director would "offer his assistance to [him] and to help [him] and the local board reach an agreement" (R. 72; see R. 27, 37, 69-70).

On January 15, 1957, the petitioner appeared before the local board and Lieutenant Colonel Francis Woodworth, the Deputy State Selective Service Director. The petitioner stated that he was employed full time in a restaurant operated by the Inner Muslim Temple in Chicago—which meant that he "hadn't time to do anything else"—that his spare time was occupied with the study and teaching of Islam, and that he was unwilling to participate in the civilian work program (R. 14-15, 27-29, 30-32, 74-75). The

petitioner was permitted to withdraw the earlier civilian work preferences which he had submitted to the board in March 1956 (R. 27, 74, 95).

Shortly thereafter, petitioner was ordered to report for work on March 4, 1957, at the Elgin State Hospital, Elgin, Illinois. He refused to comply with the order and was indicted in August 1957 (R. 7-8, 32, 94). On April 1, 1958—prior to trial on the indictment—the petitioner requested the State Selective Service Director to reclassify him as a minister (R. 81-82). He mentioned the fact that, in the hearing on his conscientious objector claim, and in the Department of Justice report on that claim, reference had been made to his attendance at the University of Islam, and he stated that he had been "improperly recommended" for conscientious objector classification. In a letter of April 10, the office of the State Director informed the petitioner that it had reviewed the contents of his file and found that there was no basis upon which to reopen his classification (R. 15).

A trial on the indictment followed, and the petitioner was found guilty on May 20, 1958. In September 1958, the district court set aside the verdict of guilty and granted the petitioner's motion for a new trial on the ground that the local board's order to report to the hospital was invalid as "not signed by a member of the local Board as required by the Regulations" (R. 9; see R. 56). Thereafter, the United States Attorney made a request to the Illinois Selective Service Headquarters that "a new order be issued in order that he may proceed to a new trial

in accordance with the Judge's decision" (R. 56). On October 21, 1958, the local board "reconsidered" but did not alter the petitioner's classification (R. 34). On the same day, it ordered him to report to the local board on November 3, 1958, where he would be given instructions to report to the Elgin State Hospital (R. 82-83, 94). On October 31, 1958, the petitioner wrote the board that at the time of his letter of April 1, 1958, *supra*, he "was and [is] a minister of the Temple of Islam." He requested reclassification as a minister, and asked for a hearing before the local board (R. 84).

The petitioner reported to the local board on November 3, 1958, but refused to proceed to the hospital (R. 35, 38, 86, 94). On November 10, 1958, the board wrote the petitioner as follows (R. 87):

> Please be advised the Local Board considered this matter closed as such evidence of ministerial duties have been considered by them; therefore no further action will be taken in this case.

Petitioner was tried on both indictments, acquitted on the one stemming from the 1957 order and convicted of failing to report in November 1958 (see opinion of the district court, R. 9-22).

ARGUMENT

1. The petitioner's chief contention (Pet. 9-15) is that the local board erred in refusing to reopen his classification and to classify him as a minister of religion (IV-D classification). The petitioner did not, however, claim to be a "minister" until April 1, 1958, after his indictment for refusing to comply with the original board order of February 1957 (see R. 15,

37-38). His claim at that time came too late unless it was sufficiently supported by a factual showing warranting reclassification. Petitioner made no such showing, and therefore his claim did not require the Selective Service System to reopen his case.

In his letter of October 1956 (*supra*, pp. 6-7), mailed almost four months after the local board, through repeated inquiries, had attempted to induce him to specify the types of civilian work which he was able and willing to do, the petitioner merely stated that he was a "full time worker" of the Temple of Islam No. 2; that he was preparing himself "in the hopes" of becoming a "Religious Teacher of Islam"; and that since the Temple was "depending on its Muslims for support in everyway", he "could not possibly work successfully for any other organization" (R. 13-14, 93). The petitioner did not seek reclassification at that time, or assert that he was a minister of religion. Three and a half months later—at the January 15, 1957, meeting with the local board—the petitioner told the board that he worked full time in a restaurant which was operated by the Temple, and that he would not perform work in the civilian program (R. 14-15, 27-29, 30-32, 74-75). He did not make a ministerial claim at that time.

The contention (Pet. 18-19) that the petitioner was denied the opportunity to present his claim for ministerial exemption to the board at the meeting of January 15, 1957, because Lieutenant Colonel Woodworth, the Deputy State Selective Service Director, was in attendance and "dominated" the proceedings is without any foundation. That meeting was called

for the express purpose of assisting the petitioner in reaching an agreement as to the type of civilian work he would accept and be willing to perform (R. 27, 37, 69-70, 72), and it was proper under the regulations for a representative of the State Selective Service Director to be in attendance for that purpose. See 32 C.F.R. 1660.20(c), *supra*, p. 4. The record shows that the meeting was confined to the purpose for which it was called and that Col. Woodworth's participation was wholly proper; the trial court found explicitly that it "does not appear that Col. Woodworth interfered in any way with the local Board's classification of the defendant or that he interfered with the independent judgment of its members" (R. 21).

Not until his letter of April 1, 1958, following his indictment for refusal to comply with the February 1957 order to report, did petitioner make a claim to be a minister. Even at that time, he made his claim to the State Director and not to the local board and offered no evidence of his ministerial activities beyond reference to his studies at the "University of Islam" and to statements at a Department of Justice hearing which had been concerned, not with ministerial claims, but with his claim of conscientious objector status. The State Selective Service Director informed the petitioner on April 10 that it had reviewed his file and that there was no basis upon which it could reopen his classification (R. 15-16).

Petitioner made no further attempt to seek ministerial status until October 31, 1958, after the second order to report. Again, he merely presented a bare claim to ministerial exemption, making reference to his letter of April 1, 1958. The local board had

already, on October 21, 1958, "reconsidered" but not altered his classification and had ordered him to report for civilian work (R. 34-35). In November 1958, the local board informed the petitioner that it considered the matter "closed" since it had previously considered his "ministerial duties" in classifying him (R. 87). This action was proper under 32 C.F.R. 1625.4, *supra*, pp. 3-4, which provides that a classification need not be reopened if the request for reopening fails to present new facts or when the new facts, if presented, would not justify a change in classification. Petitioner presented no new *facts*, either to the local board or to the state selective service authorities.

Moreover, reopening was properly refused since, at the time petitioner's ministerial exemption claims were made known to the Selective Service System (in April and October 1958), outstanding orders had been issued to him to report for civilian work. Selective Service Regulation Number 1625.2, 32 C.F.R. (Cum. Supp., 1961) 1625.2, *supra*, p. 3, provides that the "classification of a registrant shall not be reopened after the local board has mailed to such registrant * * * an Order to Report for Civilian Work * * * unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." *Feuer* v. *United States*, 208 F. 2d 719, 720-721 (C.A. 9); *Keene* v. *United States*, 266 F. 2d 378, 381-383 (C.A. 10). Although the order of February 1957 may have been technically invalid for failure to have a proper signature (see *infra*, pp. 14-15), it was an Order to Report within the meaning of this regulation, which had as one of its purposes the prevention

of last minute efforts to seek exemption from civilian work by belated claims of changes in status, such as the acquisition of ministerial status. Petitioner plainly did not show, or seek to show, that any change in his status resulted from circumstances over which he had no control.

2. Petitioner's contentions (Pet. 18, 19-21) that the district court erred in various rulings at the trial are likewise without merit on this record.

a. The Department of Justice resumé, which constituted a portion of the petitioner's selective service file, was correctly introduced into evidence. It was a properly authenticated document of a department of the government and admissible as such under 28 U.S.C. 1733. See Rule 27, F. R. Crim. P., and Rule 44, F. R. Civ. P.; *United States* v. *Borisuk*, 206 F. 2d 338, 340 (C.A. 3); *Kariakin* v. *United States*, 261 F. 2d 263, 265-266 (C.A. 9). Since petitioner based his ministerial claim partially on the Department of Justice hearing officer's report, the resumé connected with that report was relevant.

b. The trial judge properly excluded defense testimony offered to show that petitioner was acting as a minister after 1956 (R. 39, 40-41, 42, 43, 44). Since petitioner had not adduced this evidence before the local board, it did not bear on the validity of the board's action—the only issue before the court. The question before the court was whether petitioner's classification should have been reopened, not whether he could support his ministerial claim with facts never presented to the Selective Service System. As shown above, the district court properly resolved the reopening issue against petitioner.

c. No error was committed when the trial court ordered the consolidation of the two indictments against the petitioner. It was proper to order one trial on the two indictments since a similar offense (*i.e.*, failure to report to the hospital as directed) arising out of the same general course of conduct was charged in each indictment, and "could have been joined in a single indictment." Rule 13, F. R. Crim. P., *supra*, p. 4; *Williams* v. *United States*, 168 U.S. 382, 390-391. Cf. Rule 8(a), F. R. Crim. P.; *Gomez* v. *United States*, 245 F. 2d 344, 345-346 (C.A. 5), certiorari denied, 355 U.S. 863; *Williams* v. *United States*, 265 F. 2d 214, 215-216 (C.A. 9). The trial was to the court without a jury, and it is clear from the record that no confusion or prejudice resulted from the consolidation. There is no foundation, nor does the petitioner suggest one, for the claim (Pet. 21) that the consolidation of the two indictments rendered the substance of the trial so complex that a jury could not have understood the proceedings, and that, therefore, the petitioner was coerced into waiving trial by jury. Whatever the motivation which prompted the petitioner to waive trial by jury, the fact remains that he, with the advice of counsel, voluntarily and understandingly waived a jury.

3. As noted in the Statement, *supra*, pp. 8-9, after the verdict on the first trial was set aside on the ground that the order to report to the hospital was "not signed by a member of the local Board as required by the Regulations" (R. 9, 56), the United States Attorney requested that a new order be issued. The petitioner raised in a petition for rehearing below and argues here (Pet. 17-18) that the October 1958

order to report to the draft board and from there to the hospital was improperly issued because compliance with such an order would have necessitated a breach of his bail bond (given in connection with the first indictment). But reporting to a civilian hospital would not have prevented petitioner from appearing in court if his presence were required. Furthermore, although the first indictment was still outstanding and the petitioner at large on bail in the Fall of 1958 (when the second order was issued), it was apparent that if he had complied with the later order there would have been no prosecution under the earlier indictment.[1]

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

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[1] Petitioner was acquitted on that indictment on the ground that the order was invalid.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 126

WALLACE DELANEY MOHAMMED,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari to the United States Court Of Appeals For The Seventh Circuit

PETITION FOR REHEARING.

WILLIAM R. MING, JR.,
GEORGE N. LEIGHTON,
ELLIS E. REID,
123 West Madison Street,
Chicago 2, Illinois,
Counsel for Petitioner.

Midwest Law Printing Co., - 326 N. Michigan Ave., Chicago
Telephone: FIzancial 6-3938

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PETITION FOR REHEARING.

Your petitioner, Wallace Delaney Mohammed, respectfully petitions this Honorable Court to grant a rehearing of this cause, and to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

In support of this petition, your petitioner respectfully submits that this Honorable Court has overlooked or misapprehended the following point:

The void order to report issued by the local board on February 11, 1957 so prejudiced petitioner in his attempt to get a proper administrative ruling on his claim to exemption as a minister of religion, that it cannot be said that petitioner has been afforded the due process of the law.

Petitioner's selective service file was out of the control of the local board office from October 17, 1957, until September 23, 1958 (A.* 35) due to the fact that he was being prosecuted under indictment 57 CR 532 based on an order to report, which was twice later determined to be invalid by the trial court (A. 9, 56).

When petitioner's request for a reclassification of April 1, 1958 (Government Ex. B-63) was received by the local board, defendant's file was in the state headquarters (A 36). That letter was not read by the local board for six and one-half months after the date it was received (A. 34), i.e., sometime in October, 1958. It was obviously not given any consideration for such a long time for two reasons: (1) the board members and their staff were of the opinion that as long as 57 CR 532 was pending, they had no jurisdiction to change petitioner's classification; and (2) with the selective service file physically out of their hands, the local board could not take any action had they wanted to.

Thus, the local board, in part at least, based its refusal to reconsider petitioner's claim on an erroneous conclusion of law. Furthermore, when the fallacy of their position was discovered, the local board immediately issued another order to report without complying with the regulations that require notice to the registrant of a denial of a re-

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* Reference to defendant's printed appendix used below referred to as A followed by page number.

quest for reclassification. Selective Service Regulation 1625.4, 32 C.F.R. § 1625.4.

Furthermore, the failure of the local board to notify petitioner of its "reconsideration" on October 21, 1958, as prescribed by regulation, so prejudiced petitioner in his attempt to perfect his claim before the local board that the unfairness in such a situation was tantamount to a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Helen E. Everling, Chief Clerk of Selective Service Area Office No. 11, Chicago, testified at the trial for the Government. On direct and cross examination she testified that Local Board No. 48 "reconsidered" the classification of the defendant on October 21, 1958 (A. 34). The Government in its brief in opposition to defendant's petition for certiorari takes this to be the fact (Govt.'s Br. p. 9).

It is undisputed in the record that Local Board No. 48 did not notify petitioner of this "reconsideration" of his classification (A. 35).

The failure of Local Board 48 to notify defendant of its "reconsideration" as prescribed by the Selective Service Regulations was a denial of due process of law. Selective Service Regulations 1625.4, 1625.11, 1625.12, 1625.13, 1625.14, 32 C.F.R. §§ 1625.4, 1625.11, 1625.12, 1625.13 and 1625.14; *Stain* v. *United States*, 235 F 2d 399, 343 (C.A. 9, 1956); *Olivera* v. *United States*, 223 F 2d 880, 883 (C.A. 5, 1955); *United States* v. *Vincelli*, 215 F 2d 210, 213 (C.A. 2, 1954); *Atkins* v. *United States*, 204 F 2d 269, 271 (C.A. 10, 1953); *United States* v. *Fry*, 203 F 2d 638 (C.A. 2, 1953); *Knox* v. *United States*, 200 F 2d 398, 401 (C.A. 9, 1952); *United States* v. *Stiles*, 169 F 2d 455 (C.A. 3, 1948).

From the foregoing cases, it appears that it has been clearly decided in the Second, Third, Fifth, Ninth and Tenth Circuits that if there is a "reconsideration" of a registrant's classification and a failure by the local board to so notify the registrant of this reconsideration pursuant to regulation, then, if this results in prejudice to the registrant, it is a denial of due process that ousts the local board of its jurisdiction, and any subsequent order to report is void.

In the case at bar, the resulting prejudice to petitioner from this failure of the local board to so notify petitioner is quite evident. With prompt notice petitioner could have protested the ruling and at least would have had a chance to present the proof that the trial court and the Court of Appeals now so pointedly claim to be lacking. The utter silence of local board lulled petitioner into the false notion that the local board was considering his claim when all of the time it had not considered it due to the pendency of 57 CR 532 as outlined above, and upon notification of the fact that the first order was void and therefore did not oust them of jurisdiction they immediately rejected the claim and diligently prepared a new order to report under the advice and insistence of the United States Attorney's office (A. 56). For, upon receipt of that order to report by petitioner, the regulations permit a reopening only if "there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." Selective Service Regulation 1625.2. 32 C.F.R., § 1625.2. Thus petitioner's opportunity to force a reopening was neatly foreclosed.

In short, the original order to report, which was later determined to be void set off a chain of circumstances

that made it utterly impossible for petitioner to get a fair administrative determination of his claim, a determination that is the basis of his conviction.

This question was squarely raised below and adversely ruled upon by the trial Court (A. 10), again raised in the Court of Appeals and again adversely ruled upon.

We submit that there should be an authoritative pronouncement made by this Honorable Court on the subject and that the Seventh Circuit should either be upheld in its view or brought into line with the other circuits.

Wherefore, your petitioner respectfully prays that this Honorable Court will reconsider its ruling upon the issues here raised and presented, and enter an order granting the issuance of the writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM R. MING, JR.,
GEORGE N. LEIGHTON,
ELLIS E. REID,
Counsel for Petitioner.

William R. Ming, Jr., one of the attorneys for petitioner, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay and said petition is restricted to substantial grounds available to petitioner, although not previously presented.

/s/ William R. Ming, Jr.
Counsel for Petitioner.